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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 384.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

MEREDITH WOOD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

GEORGE M. WOLFSON,
Attorney for Respondent.

DEAN G. ACHESON,
Of Counsel.

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BRIEF FOR THE RESPONDENT.

Opinions Below. Jurisdiction.

The opinion of the Board of Tax Appeals is reported in 37 B. T. A. 1065 (Rec., pp. 11-15). The opinion of the Circuit Court of Appeals is reported in 104 F. (2d) 1013 (Rec., p. 29). The case is here on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Rec., p. 30).

Question Presented.

Is respondent taxable under Section 166 of the Revenue Act of 1934, upon trust income paid during 1934 to his wife as the beneficiary of a three year trust created by declaration of trust executed by respondent in April, 1931

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(said period being extended to five years from the original date by supplementary declaration of trust executed in March, 1932), pursuant to the provisions of which, at the expiration of the five year period or the prior death of respondent or his wife, the corpus of the trust was to revert to the respondent or his estate.

Statutes and Regulations.

Certain of the statutes and regulations hereinbelow referred to are printed in the appendix, *infra*, pp. 34 to 40.

Statement of the Case.

Meredith Wood, the respondent, a resident of Scarsdale, New York, by declaration of trust executed April 8, 1931 created a trust expiring at the termination of a fixed period of three years, or the prior death of the respondent or his wife, with the income payable to respondent's wife during the existence of the trust, the principal of the trust at the expiration thereof reverting to the respondent or his estate (Rec., pp. 21-23).

Thereafter on March 25, 1932 the respondent by supplementary declaration of trust extended the period of three years to a period of five years so that the trust continued in effect until the expiration of five years from April 8, 1931 or the death of respondent or his wife, whichever event should first happen, with reversion to the respondent or his estate (Rec., pp. 23, 24).

Hereinafter reference to the trust or trust instrument will be understood to mean the original trust instrument as modified by the supplementary declaration of trust.

The trust terminated on April 8, 1936 by reason of the expiration of the five-year period (Rec., pp. 4, 12).

The trust contained no power of revocation or any power on the part of any one to revest in the grantor at any time title to any part of the corpus of the trust. The grantor's sole rights in that corpus were the reversionary rights above described.

The trust instrument, which was short, gave to the trustee (who was the respondent) certain formal powers usually found in trusts executed under the laws of New York. These powers were:

(a) To retain as a trust investment, or to sell, the Book-of-the-Month Club, Inc. stock originally constituting the corpus of the trust;

(b) To make investments or reinvestments in so-called "non-legal" securities;

(c) For purposes of the trust, to fix and determine the value of property held thereunder;

(d) To determine whether properties or moneys received should be treated as capital or income and the method of allocating expense as between them, except that stock dividends and rights to subscribe to stock were to be treated as capital (Rec., pp. 21, 22).

There were also provisions for substitution of trustee and any substituted trustee was given the same powers which were given to the settlor as trustee (Rec., pp. 21, 22).

The income from the trust during 1934, the taxable year in question, was received by the respondent as trustee, deposited in a special account, and was in its entirety turned over by him to the beneficiary. During the entire period of the trust the income was received and paid out in the same manner (Rec., pp. 12, 20).

The Commissioner increased the respondent's income for 1934 by the amount of the dividends received during that

year on the stock held in trust (Rec., pp. 6, 7), and contended before the Board of Tax Appeals that such income was taxable to the respondent under Sections 166 and 167 of the Revenue Act of 1934 (Rec., p. 13). The Board of Tax Appeals held that such action of the Commissioner was erroneous (37 B. T. A. 1065; Rec., pp. 11-15). On appeal to the Circuit Court of Appeals for the Second Circuit, the Commissioner expressly abandoned his contention under Section 167 of the Revenue Act of 1934 and in his brief stated that the question presented was whether the taxpayer was "taxable under Section 166 of the Revenue Act of 1934 upon trust income paid to his wife as beneficiary" (Petitioner's brief, C. C. A., p. 2; copy filed herein with respondent's brief opposing application for certiorari). In his said brief petitioner further stated that "the Commissioner bases this appeal solely on the question whether or not such income is taxable under Section 166 of the 1934 Act" (*Id.*, p. 5). Said Section 166 of the Revenue Act of 1934 reads as follows:

> "Sec. 166. Revocable Trusts.
>
> Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested:
>
> (1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
>
> (2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,
>
> then the income of such part of the trust shall be included in computing the net income of the grantor."

The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (104 F. (2d) 1013; Rec., p. 29), its opinion consisting of the following *per curiam* memorandum:

> "Order affirmed on authority of *United States* v. *First National Bank of Birmingham*, 5 Cir., 74 F. (2d) 360."

Petitioner urges here the same points that were made by him before the Circuit Court of Appeals and in addition makes a contention not previously made in the case, to wit, that the Court below erred in failing ~~to hold~~ that the income from the trust is taxable to respondent under Section 22(a) of the Revenue Act of 1934 (*infra*, p. 34), which defines gross income in general terms (Pet. Br., p. 4).

Summary of Argument.

Respondent contends:

That the reversionary interest of respondent did not constitute a power to revest in the respondent title to any part of the corpus of the trust within the meaning of Section 166 of the Revenue Act of 1934, and that neither respondent nor any other person or combination of persons specified in Section 166 at any time had such power, either by virtue of the provisions of the trust instrument or as the result of any rule of law; that if there were doubt as to the meaning of Section 166, its legislative history would necessitate a construction as above set forth.

That to the extent that Article 166-1 of Regulations 86 as amended (*infra*, pp. 34-38) may be held to construe Section 166 of the Revenue Act otherwise, said regulation is invalid.

That petitioner should not be heard at this stage of the litigation to urge that Section 22(a) of the Revenue Act of 1934 or any provision of that act other than Section 166 thereof requires the income of this trust to be taxed as income of the respondent.

That in any case, neither Section 22(a) nor any other provision of the Revenue Act of 1934 would justify the taxing of the income from this trust to respondent.

That if Section 166 or 22(a) or any other provision of the Revenue Act of 1934 were to be construed as taxing the income from this trust to the respondent, its constitutionality would be imperilled in that it would tax to one person income belonging to and received by another.

ARGUMENT.

POINT I.

Neither respondent, nor any person or combination of persons specified in Section 166 had the "power to revest" in respondent "title to any part of the corpus of the trust".

Mr. Wood is a resident of New York (Rec., pp. 2, 11) and the trust was executed in New York (Rec., pp. 22, 24) and is governed by the laws of New York (*Blair* v. *Commissioner*, 300 U. S. 5, 9, 10). In this trust there was no power to revest, ordinarily known as a power of revocation, and under the applicable authorities no such power can be implied. Section 23 of the New York Personal Property Law provides the only method of accomplishing a revocation of such a trust under New York Law. That section reads as follows:

"§23. Revocation of Trusts Upon Consent of All Persons Interested.

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

In *Schoellkopf* v. *Marine Trust Company*, 267 N. Y. 358, the Court states, by Lehman, J., page 361:

"The settlor has attempted to revoke the trust. He has not in the trust indenture reserved any right of revocation, and he has parted with all his title to the trust property. He can revoke the trust only 'upon the written consent of all the persons beneficially interested' therein, given in accordance with the provisions of section 23 of the Personal Property Law (Cons. Laws, ch. 41)."

Under the declaration of trust as amended the beneficiary was the absolute owner of the income and the respondent had no rights therein (*Schoellkopf* v. *Marine Trust Company, supra*, 267 N. Y. at p. 362; *Blair* v. *Commissioner*, 300 U. S. 5, 13; *United States* v. *First National Bank of Birmingham*, 74 F. (2d) 360, 362 (C. C. A. 5th); *Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2d)).

In this connection we may also mention that a trust for a term of years is valid under New York law provided that by its provisions it must terminate within the statutory period of two lives.

New York Personal Property Law, Section 11, *infra*, p. 39;

Kahn v. *Tierney*, 135 App. Div. 897 (2nd Dept.), aff'd 201 N. Y. 516).

Settlor's Reversionary Interest Was Not a Power to Revest.

Petitioner has throughout this litigation confused a power to revest with an ordinary right of reversion. This confusion is illustrated by the statement in his brief in No. 383 (p. 19): "There is no difference of substance between a short-term trust and a revocable trust." We submit that the difference is obvious and well settled.

We ask the indulgence of the Court in respect of the following comments which petitioner's contention,—apparently urged seriously,—would seem to render necessary.

A power imports ability on the part of the possessor thereof to exercise an act of will, whereas a reversion is a property right the existence of which is independent of the will of the possessor. This distinction is amply borne out by lay and legal definition. A succinct description of the fundamental characteristics of a power is found in *Perry on Trusts* (5th Ed.), Volume 1, in which the learned author at §248 states:

> "* * * *Mere powers* [the author distinguishing such powers from those to be exercised for the benefit of others] are purely discretionary with the donee: he may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the powers unexecuted." (Italics by the author.)

This is consistent with dictionary definition.

Bouvier's Law Dictionary (Baldwin's Ed., 1926): "The right, ability or faculty of doing something." Bouvier further defines "powers of revocation" as "those which are to divest or abridge an existing estate."

Funk & Wagnalls' New Standard Dictionary of the English Language (1937): "1. Ability to act so as to produce some change or bring about some event; * * * 2. Such absence of restraining influence as leaves power of volition to the subject; * * * 4. The right, ability or capacity to exercise authority or control."

Century Dictionary and Cyclopedia: "(1) In general such an absence of external restriction and limitation that it depends only upon the inward determination of the subject whether or not it will act; * * * (2) an endowment of a voluntary being whereby it becomes possible for that being to do or effect something; * * * (5) the ability or right to command or control; dominion; authority; * * *."

The distinction between a "power" and a "reversion" is apparent upon a comparison of the above definitions of "power" with statutory and dictionary definitions of "reversion." The New York Real Property Law, Section 39, contains the following definition of "reversion":

> "A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of one or more particular estates granted or devised."

This definition applies to personal property as well as real property (*Davies* v. *City Bank Farmers Trust Company*, 248 App. Div. 380 (First Dept.)). *Cf.* N. Y. Real Property Law, Article 5, dealing with powers.

Bouvier's Law Dictionary (Baldwin's Ed., 1926): "*Reversion.* The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. * * * The reversion is a vested interest or estate and arises by operation of law only." To the same effect, see 21 *Corpus Juris* 1016.

It follows that neither respondent nor any one not adversely interested had any power over the corpus of this trust or the ability to revest in respondent any rights therein. His right was the simple property right of reverter.

The well reasoned opinion of the Board of Tax Appeals herein (Rec., pp. 11-15) as affirmed by the Circuit Court of Appeals, finds ample support in decisions of the lower courts.

> *United States* v. *First National Bank of Birmingham*, 74 F. (2d) 360 (C. C. A., 5th);
> *Shanley* v. *Bowers*, 81 F. (2d) 13 (C. C. A., 2nd);
> *Clifford* v. *Helvering*, 105 F. (2d) 586 (C. C. A., 8th), No. 383 present Term, to be argued with this case.
> *Knapp* v. *Hoey*, 104 F. (2d) 99 (C. C. A., 2nd).

Numerous decisions of the Board of Tax Appeals to the same effect are set forth in Petitioner's brief in No. 383 (p. 25, footnote).

We particularly commend to this Court the reasoning of the Circuit Court of Appeals for the Fifth Circuit in the *First National Bank of Birmingham* case, *suprà*, 74 F. (2nd) 360. The case involved a conveyance to an educational foundation which the court treated as a trust for a term of one year from October 1, 1928 to September 30, 1929. The Treasury Department sought to tax to the settlor the income received during the first nine months of 1929 under Section 166 of the Revenue Act of 1928, which provided for taxation of such income to the grantor where he had "at any time during the taxable year * * * the power to revest in himself title to any part of the corpus of the trust." The court unanimously decided that the

grantor was not taxable on this income, Walker, C. J., saying at page 362:

"The corpus of the trust was the granted estate in the described property for the stated period. The income from that property during that period was the grantee's income, not the grantor's income, as it was subject to the unfettered command of the grantee, not subject to any power over it exercisable by the grantor; the source of it being a property interest or estate irrevocably vested in the grantee. (Citing cases.) *The income in question was not taxable against appellee's testator because he did not own that income, or have any beneficial interest therein when it accrued, and did not have the power, either alone or in conjunction with any person not a beneficiary of the trust, to revest in himself the title to the property interest or estate which was the source of that income.*" (Italics ours.)

The mere statement of petitioner's argument that a reversion is the same as a power to revest would seem to bear its own refutation.

In view of the reliance placed by petitioner upon *duPont* v. *Commissioner*, 289 U. S. 685, and its companion case, *Burnet* v. *Wells*, 289 U. S. 670 (regarding which we comment below in Point V), it is pertinent to call attention here to the distinction drawn by this court in the *Burnet* case between life insurance premium trusts and trusts where, as in the instant case, no restrictions are placed upon the disposition of the income by the beneficiary, its owner. We quote from the opinion of Mr. Justice Cardozo, pages 681-682:

"Trusts for the preservation of policies of insurance involve a continuing exercise by the settlor of a power to direct the application of the income along

predetermined channels. In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use."

Petitioner makes the further contention (Br. in No. 383, p. 26), if we understand him correctly, that the existence of the grantor's power of disposition *before the creation of the trust*, is the "power to revest" referred to in the statute, and that such power was exercised by the mere creation of the trust with reversion to grantor. Such a contention, of course, is at variance with all accepted definitions of "power" (*supra*, pp. 8, 9). The word "power", says Farwell (Powers, Ch. 1, p. 1), is a technical term "and is distinct from the dominion which a man has over his own estate by virtue of ownership."

Petitioner's argument seems to be that Congress could not have intended to render the income of a trust taxable to grantor when he has an executory power of revocation and to relieve such income from taxation when he exercises the dominion of ownership by creating a term trust. With all respect we submit that petitioner's contention is specious and would lead to an absurdity. For if his argument be sound, it would apply as well to a ninety-nine year trust or a life trust and would apply as well to a trust where there is no reversion but a gift over to third persons and, in fact, would apply to all types and kinds of income trusts. Thus, every grantor of a trust indenture would be taxed in respect of all of the income during the life of the trust. It would seem to us to be more sensible to attribute to Congress the intention to provide what the clear meaning of the words used indicates.

POINT II.

If there were ambiguity in the language of Section 166, consideration of its legislative history supports respondent's contentions as set forth in Point I hereof.

The provisions of the income tax laws corresponding to Section 166, prior to the changes made in 1934, provided for taxation of the income of a revocable trust substantially as follows:

> "Where at any time *during the taxable year* the power to revest in the grantor title to any part of corpus of the trust is vested * * * in the grantor * * * then the income of such part of the trust *for such taxable year* shall be included in computing the net income of the grantor." (Revenue Act of 1932, Sec. 166; italics ours.)

Similar provisions were embodied in Section 219(g) of the Revenue Acts of 1924 and 1926 and in Section 166 of the Revenue Act of 1928. The 1934 amendment simply struck out the portions of the earlier acts which are italicized in the above quotation.

The reason for the change is not in dispute. The so-called year and a day trusts—trusts which could not be revoked unless notice of revocation was given prior to the taxable year—escaped the application of the statute. *Langley* v. *Commissioner*, 61 F. (2d) 796 (C. C. A. 2d); *Commissioner* v. *Grosvenor*, 85 F. (2d) 2 (C. C. A. 2d); *Lewis* v. *White*, 56 F. (2d) 390 (D. C., Mass.), appeal dismissed, 61 F. (2d) 1046 (C. C. A. 7th); *Faber* v. *United States*, 1 F. Supp. 859 (Ct. Cls.). By this device the effectiveness of the statute could in large part be avoided. Indeed, as the court in *Corning* v. *Commissioner*, 104 F. (2d) 329, 333

(C. C. A. 6th) pointed out, this opened the door, if it did not invite the so-called "year-and-a-day" trusts. The 1934 amendment was designed to close that loophole.

Former Under Secretary of the Treasury Roswell Magill recommended that the statute be amended to include two classes of trusts, that is, revocable trusts and short term trusts. His language is as follows (Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 151):

> "The income from short term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trusts."

Congress took action on one of his recommendations, that is, it amended the statute so as to cover trusts revocable "at the expiration of a short period after notice", but took no action in regard to his other recommendation—to wit, that the income from short term trusts should be taxed to the creator of the trust.

The amendment was presented upon the floor of the Senate, passed by the Senate, and accepted by the House conferees. Their report to the House states (H. Rep. 1385, 73d Cong., 2d Sess., p. 24):

> "Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include

the trust income for the taxable year in his return. The Senate amendments require the income *from trusts of this type* to be reported by the grantor. The House recedes. (Italics ours.)

It must be obvious, in the light of this legislative history, that there was no intent to change the meaning of the words "power to revest". The Commissioner does not claim that the words "power to revest" in the statute as it stood prior to 1934 had the meaning he gives them when found in the 1934 amendment. But there is no indication in the history of the amendment of any intent to change that meaning. See *Corning* v. *Commissioner*, 104 F. (2d) 329, 332 (C. C. A. 6th). Congress was concerned solely with the time within which the "power to revest" granted by the trust instrument could be exercised. It was not concerned with an irrevocable term trust where no "power" to revest is created.

The Commissioner is now attempting to take the action which Congress failed to take.

POINT III.

To the extent that Article 166-1 of Regulations 86 as amended by T. D. 4629, requires the taxation of the income from this trust as income of respondent, the said article is invalid.

The Treasury Regulation relied on by petitioner (*infra*, pp. 34-38) obviously goes far beyond the language of Section 166. Petitioner contends that since Section 166 of the Revenue Acts of 1936 and 1938 are similar to the Revenue Act of 1934, this Regulation has ripened into a sort of legislative fiat (Pet. br. in No. 383, p. 12). This argu-

ment has no substance. Treasury Regulations may properly attempt to construe an ambiguous statute, but they may not go beyond the limitations of a clear and unambiguous statutory provision, as the legislative power is vested solely in the Congress.

> *Koshland* v. *Helvering*, 298 U. S. 441, 445;
> *Blatt Co.* v. *United States*, 305 U. S. 267, 279.

There is no ambiguity in the meaning of Section 166 which requires clarification by a Treasury decision.

Moreover, petitioner's contention overlooks the fact that the regulations, since their amendment in 1936, do not purport to rest the taxation of the income of term trusts to the grantor upon Section 166. This was the position of the Treasury Department in the regulations as promulgated on February 11, 1935.

That position, however, was abandoned even before the enactment of the Revenue Act of 1936 on June 22, 1936. T. D. 4629, approved March 7, 1936 (XV-1 Cum. Bull. 140), amended Article 166-1 of Regulation 86 and declared:

> "(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. * * *"

After thus recognizing the applicability of Section 166 solely to revocable trusts, which had been denied by the former regulation, Article 166-1 states the important factor to be whether "the title to the corpus will revest in the grantor *upon the exercise of such power* * * *" (Italics ours). Finally, to make the scope of Section 166 even more explicit, the amended regulation states:

> "But the provisions of Section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, *not specified therein*, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus." (Italics ours.)

Following that, the amended regulation makes it clear that the contention, that the grantor of an irrevocable term trust may be taxable upon the income, arises, if at all, from "the Act" which "has its own standard" (otherwise undocumented).

After the Treasury thus abandoned Section 166 as its authority for taxing irrevocable trusts of the sort here involved, the question of the applicability of Section 166 to an irrevocable trust was litigated in *Phebe Warren McKean Downs v. Commissioner*, 36 B. T. A. 1129, and was decided against the Commissioner. The Commissioner acquiesced (C. B. 1938-1, p. 9). In I. T. 3238 (C. B. 1938-2) the Commissioner squarely ruled that in view of that acquiescence, where "the possible future revesting of the corpus of the trust in the grantor is governed entirely by the terms of the trust instrument itself and is in no way dependent upon the exercise of any power vested in the grantor," Section 166 had no application.

In view of these administrative rulings, it cannot be seriously argued that Congress has ratified an interpretation which the Commissioner has not only not made but has expressly repudiated.

POINT IV.

Petitioner will not be heard to urge here that this case is governed by Section 22(a) of the Revenue Act of 1934.

Petitioner at no stage of this proceeding prior to his application for certiorari took the position that the income was taxable to respondent under any provision of the Revenue Act of 1934 other than Section 166 or Section 167. In his notice of deficiency, the Commissioner stated that the dividends which he proposed to tax as income of the petitioner were to be so taxed because "paid on stock held in a *revocable trust* created by you for the benefit of your wife" (Rec., p. 7; italics ours). It is to be noted that the only section of the Revenue Act of 1934 dealing with the taxation of income from revocable trusts is Section 166. Before the Board of Tax Appeals, the petitioner relied solely on Sections 166 and 167 and in the Circuit Court of Appeals he rested his entire case on Section 166 (see *supra*, p. 4).

Petitioner endeavors to show (Br., pp. 6 to 8) that he has saved his point for review. But it is submitted that he states himself out of court by the admission (p. 6): "We concede that the Government's brief in the court below expressly waived reliance upon any section other than Section 166."

This Court does not favor injection of a new point at this stage of a litigation.

In *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, an income tax case, the Commissioner urged before this Court a construction of Section 202 (b) of the Revenue Act of 1918, which had not been presented to any of the courts below.

In refusing to pass upon this point, the Court said at page 498:

> "The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below. His petitions for these writs did not present the question to this court. We are not called on to consider the construction of §202 (b) now proposed" (citing numerous cases).

In *Helvering* v. *Minnesota Tea Company*, 296 U. S. 378, another income tax case, the Court disposes of one contention of the Government as follows (p. 380):

> "This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it."

So, also, in *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, another income tax case, the Court states, page 418:

> "The Board of Tax Appeals expressed no opinion concerning the Commissioner's method of reckoning—it was not requested so to do. There the respondent relied entirely upon the second point. The Circuit Court of Appeals ruled only on the same point. In such circumstances, we do not undertake to determine what was not considered below."

See also *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206.

It should be noted that petitioner does not question the rule that reversal cannot ordinarily be sought upon a ground not urged below (Br., p. 7).

V.

Even were the point open for consideration, neither Section 22(a) nor any other provision of the 1934 act renders the income of this trust taxable to respondent.

We believe, as we have stated in Point IV, *supra,* that the instant case does not involve the question of the taxability of the income of this trust under Section 22(a). But, even if that independent basis for decision were open to petitioner, we believe that his argument with respect to its application must fail.

The securities which the respondent placed in trust yielded in 1934 dividends of $8,750 (Rec., p. 4). The petitioner contends that this sum should be taxed as income of the respondent. To support that claim he argues that Congress, by the use of the general language of Section 22(a), intended to "use its power to the full extent." (Brief in No. 383, p. 10.) But this does not help in the resolution of the problem of this case. Whether or not Congress meant to tax *all* income is not the question. Of course this $8,750 must be taxed to someone. The question here is to whom it is to be taxed—the beneficiary of the trust, or the settlor. Congress meant to apply its maximum taxing power to the beneficiary just as much as to the settlor. Even the petitioner does not contend that Section 22(a) is to be interpreted as evidencing a purpose on the part of Congress to tax *both* to the utmost.

Quite apart from all statutes, regulations, and decisions, it would seem more natural, with respect to trusts of the

character of the one here involved, to attribute the income to the beneficiary than to the settlor. The person who has the income free in his hands, and can use the income to satisfy the tax collector, would generally be the person to pay the income tax. *Blair* v. *Commissioner,* 300 U. S. 5; *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Shanley* v. *Bowers,* 81 F. (2d) 13 (C. C. A. 2d). To be sure, there may be a twilight zone—a zone of uncertainty as to which one should pay the tax, for all will admit that the same income cannot be taxed to two different persons. There may be situations where Congress might properly declare the result, basing its judgment on a weighing of the interest of each in the income, the avoidance of surtaxes, the ease or certainty of collections, or a variety of other factors. But Congress has done nothing here to attribute the income to any one but its recipient.

The statute considered by the Court in *Burnet* v. *Wells,* 289 U. S. 670, and *duPont* v. *Commissioner,* 289 U. S. 685, is an instance of a Congressional declaration. The issue there was solely one of constitutionality. In those cases the Court considered a statute which declared that the income from a so-called insurance trust should be taxed to the settlor. That the Court clearly distinguished those cases from trusts such as the Wood trust is shown by Mr. Justice Cardozo's statement quoted, *supra,* pages 11, 12.

Certainly, in the instant case, no one would dispute that it would be more natural to attribute the income to the beneficiary than to the grantor. We will show below, in discussing the various elements upon which petitioner relies, that the trust income here was irrevocably committed to the beneficiary. This income was hers to do with as she wished; there were no strings attached to it. The normal and natural presumption in this case is that here the bene-

ficiary, not the grantor, is the one to whom the taxing power of Section 22(a) was extended.

But we can go farther. Congress itself has indicated that the income from all trusts (with certain exceptions which do not apply, *cf.* Point I, *supra*) shall be taxed not to the grantor, but to the beneficiary.

Sections 161 to 167 of the Revenue Act of 1934, inclusive, deal with the taxation of "estates and trusts". Section 162(b) provides that "in computing the net income of the estate or trust the amount of the income * * * which is to be distributed currently by the fiduciary to the beneficiary" shall be allowed as a deduction, "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiary". That is a general rule applicable to all trusts, including ordinary term trusts. Sections 166 and 167 make an exception of certain trusts, such as revocable trusts, insurance trusts, etc., but, as we have shown in Point I, *supra*, the present trust is not taxable under Section 166, and Section 167 is not involved in the case.

If there be a "twilight zone", then, Congress has legislated in regard to it. Congress has said that income of trusts generally shall be taxed to the beneficiary and has defined specifically the exceptions, which exceptions definitely do not include term trusts. *Expressio unius est exclusio alterius.*

Nor does *Douglas* v. *Willcuts*, 296 U. S. 1 (Pet. Br., in No. 383, pp. 10, 21), destroy the force of this Congressional declaration. The Court stated that, despite the specific provisions of Sections 166 and 167, income which "in contemplation of law" remained "in substance that of the grantor" should be taxed to him (296 U. S. at p. 10). The Court was there dealing, however, with a situation in which the grantor himself was in reality the beneficiary of the trust—

the income was used to discharge an obligation which he would otherwise have had to meet. The Court stated that the provisions of the statute quoted above do not (p. 10)

> "preclude the laying of tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had presumably received it."

No such situation is present here.

Therefore, we start out with the initial assumption that the beneficiary who in fact received the income as her free unfettered possession is the one to pay the tax. Next, we have to inquire how that initial assumption is affected by, first, the regulations of the Treasury Department, and, second, the decisions of this Court.

The regulations (*infra*, pp. 34-38) are petitioner's chief reliance (Br. in No. 383, pp. 10-15, 26, 27). But they fail him in two respects. Seemingly he relies upon the re-enactment of the statute after their promulgation as creating a Congressional mandate (Br. in No. 383, pp. 12, 26). It seems clear, however, that, if they are used to warrant the taxation of income to A which would naturally be taxed to B, they are directly within the rule that regulations which seek to expand the statute are a nullity (see Point III, *supra*, p. 15).

But whether or not they are a nullity under the above rule, they cannot assist petitioner here. It is impossible to find any clear direction in them. They say, in the most general terms, that the income of a trust is to be taxed to the settlor "if he is regarded as remaining in substance the owner of the property." But Article 166-1 gives no guide as to when that situation exists. Certainly the Article does not say that all term trusts (or even all short-term trusts, whatever that may mean) are included in that

category. It does not say that all trusts in which the grantor is the trustee are to be included. In fact, that element, so strongly relied on here, is not even mentioned. It gives no hint whether the time "three years" in the illustration is the maximum term, or the average. Indeed, notwithstanding petitioner's statement to the contrary, we have considerable doubt whether the instant case is within the regulations at all. It is not clear whether the "son John" mentioned in the illustration (Pet. Br. in No. 383, p. 11) means a child or relative to whom the grantor owes a legal obligation of support, or otherwise; or whether the regulation would apply equally to a trust for one, three, ten or twenty years. There is no specific rule for guidance as the regulation is unclear. Petitioner's decision to allocate this income to respondent is entitled to no more consideration than the facts of the case warrant.

We turn, then, to examine the facts of this case upon which petitioner relies to change the ordinary presumption and the Congressional mandate. We think it demonstrable that there is nothing so peculiar about the trust as to take it out of the ordinary rule.

(a) *The fact that the beneficiary was the wife of the settlor.* This is so minimized by petitioner as to make it doubtful whether he attaches any importance to it. (See, however, Br., p. 6, and Br. in No. 383, pp. 14, 22.) The mere fact of the relationship is obviously not sufficient. The income here was not to be used to discharge a legal obligation of respondent to his wife, as in *Douglas* v. *Willcuts*, 296 U. S. 1, nor to support his minor children.

(b) *The fact that the trust is for a term of years.* The next element relied upon by petitioner is that this trust was for a period of five years (Br., p. 5, and Br. in No. 383, pp. 11, 24, 27). This contention affects the corpus, rather than

the income, and seeks to attribute income to respondent because of his asserted interest in the "tree upon which it grew."

Petitioner has confused the instant case with decisions of this Court holding that mere assignments of income to be earned in the future will not avail to relieve the assignor of income taxes (Pet. Br. in No. 383, pp. 17, 18), but professes to have no quarrel with the doctrine that, where the corpus and the income are effectively disposed of, at least for a substantial period of time, the income is not taxable to the grantor simply because he may sometime in the future recover the corpus for himself (*Id.*, p. 13). In *Blair* v. *Commissioner*, 300 U. S. 5, the distinction between the two situations is effectively stated at pages 11 and 12:

> "The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Douglas* v. *Willcuts*, 296 U. S. 1, 9; *Helvering* v. *Stokes*, 296 U. S. 551; *Helvering* v. *Schweitzer*, 296 U. S. 551; *Helvering* v. *Coxey*, 297 U. S. 694. See, also, *Burnet* v. *Wells*, 289 U. S. 670, 677. There is here no question of evasion or of giving effect to statutory provisions designed to forestall evasion; or of the taxpayer's retention of control. *Corliss* v. *Bowers*, 281 U. S. 376; *Burnet* v. *Guggenheim*, 288 U. S. 280.
>
> In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership. See *Poe* v. *Seaborn*, *supra*; *Hoeper* v. *Tax Commission*, 284 U. S. 206."

Certainly in the present case the title to the corpus of the trust has been effectively transferred just as it was in the

Blair case. The tree as well as the fruit is gone, for a period of years. Can it be said that the grantor retains the substance of enjoyment of the corpus during the trust period simply because at the end of the period the corpus will revert to him? We believe not (see cases under Point I, *supra*, pp. 10, 11).

duPont v. *Commissioner*, 289 U. S. 685, relied on by petitioner, does not aid him (see discussions, *supra*, pp. 11, 12, 21). The trusts there involved required that the income should be used to pay premiums on the grantor's life insurance. The "many attributes of ownership" retained by the grantor which were referred to by the Court as warranting the taxation of such income to the grantor (289 U. S. 689) obviously refer to both the earmarking of the income and the length of the trust. As we have shown above, there is no such earmarking here, nor is there any equivalent of it. We submit, rather, that the instant case is, so far as this aspect is concerned, directly within the principle of the *Blair* decision, which recognizes that an effective, irrevocable transfer of corpus and income, even though they may ultimately revert to the grantor, makes the recipient of the income, and not the grantor, the real beneficiary of the income, and the one who should pay the tax.

In *Griffith* v. *Helvering*, No. 49, this Term, this Court held that the assignment of stock to be sold at a profit by a controlled corporation did not relieve the grantor of taxation upon the profits. It is apparent that it was control of the income through the medium of stock ownership which formed the basis for the decision. Here, on the contrary, respondent lost completely any voice in the manner in which the income was to be used.

(c) *The fact that the grantor is trustee and as such exercised certain formal powers.* The third element on which

petitioner relies is the fact that the respondent is himself trustee (Br. in No. 383, pp. 14, 15), and as such had certain formal powers (*supra*, p. 3). As trustee, like any other trustee, he had administrative duties with respect to the trust property. We assume that petitioner is not claiming that the trust was a sham. No such issue was raised below, and there was no evidence on that point, nor any occasion to adduce any. But, except for that possible claim, there is no relevance to the point that the settlor was the trustee. *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48. Petitioner himself would not assert a general rule that the fact that the settlor is trustee is sufficient to cause the income to be taxed to him. When the income from the corpus is beyond the control of the settlor, and when the ownership of the corpus has been effectively transferred for a substantial period of time, the privilege—or right if petitioner chooses so to term it—of preserving the trust estate until it may ultimately return to the settlor, is wholly unimportant. The tax here is upon income; and not upon corpus. *Douglas* v. *Wilcutts, supra*.

Petitioner has placed particular emphasis upon the right of the trustee (who was the respondent) to determine whether property or money received from the trust should be treated as capital or income (Pet. Br., pp. 5, 6). But this is a customary provision in New York trusts, as are the other formal provisions above referred to, and as stated above, this power was given as well to any substituted trustee (Rec., p. 21). Any one familiar with the difficulty which the New York Court of Appeals has had in dealing with the problem of allocating extraordinary dividends and unusual distributions as between principal and income will understand why draftsmen of New York trusts customarily attempt to obviate this fruitful source of litigation. (See *Matter of Osborne*, 209 N. Y. 450; *Equitable Trust Co.* v.

Prentice, 250 N. Y. 1.) The existence of this and other powers does not lead to the conclusion that respondent ignored or intended to ignore his duties as trustee (see *Poe* v. *Seaborn*, 282 U. S. 101, 112). Actually, none of the powers listed on page 3 hereof (except the power to retain in the trust the Book-of-the-Month Club, Inc. stock) was exercised by respondent.

It should be further noted that a retention of any actual income in principal account would violate the New York statute regarding accumulations (N. Y. Pers. Prop. L., Sec. 16, *infra*, p. 39). The fact is, as above stated, that all income was paid to the beneficiary.

We submit therefore, that the factors on which petitioner relies to justify the application of the regulations are, when examined, of little weight. Admittedly, no one of them alone is sufficient. Nor do the three together add up to more. No decision of this Court has sanctioned the position which petitioner now adopts.

In the final analysis there is nothing in the statute, the regulations or the decisions which warrants taxing the income of this trust to respondent unless the trust is fictitious. Even petitioner seems to recognize this, for after considerable circumlocution he refers to the trust device as a "fiction" (Br., in No. 383, p. 16). This is finally the real test in the case. Petitioner recognizes that to win he must assert that the trust device was a "fiction." If the trust was a fiction, then of course it should be disregarded. If it was not a fiction, both normal principles and Congressional mandate direct that the income shall be taxed to the beneficiary. But how was it a fiction? Is every term trust a fiction? Is every trust for a wife a fiction? Is every trust where the settlor is trustee a fiction? These are the only elements that petitioner speaks of or that are in the case upon which such assertions could be made. But no

one of them is enough on which to base an assertion of fictitiousness. Nor are all of them taken together any better.

It is not true, as petitioner asserts (Br., in No. 383, p. 14), that the respondent was no poorer by the creation of this trust. On the contrary, in the year 1934 he was poorer by the sum of $8,750. It is not to be assumed that a wife's expenditures are directed by the husband, and for his benefit. In the year 1934 no part of this $8,750 was available to the respondent. If a man chooses honestly to relinquish both property and income, rather than to pay the tax upon the income, there is nothing in the statute or the decisions which says he may not do so.

Petitioner further stresses tax avoidance (Br. in No. 383, pp. 28, 29). He points out that while admittedly Congress may not tax A on B's income (*Hoeper v. Tax Commission*, 284 U. S. 206), it may adopt reasonable measures to prevent escape from the surtaxes which it imposes. But here Congress has not acted in that direction. Indeed, despite a recommendation by the Treasury Department that it should take action with respect to term trusts, and despite the fact that a simple statutory solution lay ready at hand (see English statute, Pet. Br. in No. 383, p. 27, footnote), Congress refused to act. (See Point II, *supra*, p. 13.) The Department took matters into its own hands by the promulgation and attempted enforcement of Article 166-1.

Lacking Congressional mandate, the Department was forced to attempt some vague limits of its own. Petitioner now asserts (Br. in No. 383, p. 13) that precisely where the line should be drawn is a matter which should be left to the unfettered discretion of the Department. Its regulations state (Art. 166-1(b)) that in determining whether the

grantor is in substance the owner of the corpus "the Act has its own standard, which is a substantial one." We search in vain in Section 22(a), or in any other section of the Act, for the basis for that statement.

But if the Act can be said to have a "substantial standard," certainly it is not articulated in the regulations or in petitioner's brief. We have already pointed out the impossibility of determining with any particularity whatever the application which he makes of the elements involved here to any other case. So far as the regulations or the brief is concerned, the standard lies hidden in the Commissioner's own conscience. Petitioner admits that the income of a long term irrevocable trust would not be taxed to the settlor (Br. in No. 383, p. 13). Yet he also stresses in his brief in the instant case that at the end of the tax year 1934 the trust here was less than a 16-month trust (Br., p. 5). Does he mean that no matter how long the trust, its income becomes taxable to the grantor when it gets so near the end that, if then created, it would be taxable to him? It is difficult to attribute any other meaning to the remark, yet it introduces a double element of vagueness.

We do not believe that Congress intended, or would wish, that this great body of ill-defined doctrine should flower from the simple language of Section 22(a). Nor do we believe, as necessarily follows, that this Court can look forward with equanimity to the task of gradually defining the limits of such a principle. The petition for certiorari in No. 383 (p. 8) says that there are now pending 43 cases presenting this same issue. It is a fair assumption that many of them will present distinct problems which will have to be litigated. New problems will certainly arise. If ever a vista of litigation were opening, it is in petitioner's contention in cases now before the Court.

The solution, of course, is to attribute income, until Congress speaks to the contrary, to the person who receives its benefit—to the person who, if Section 22(a) stood alone, would normally be taxed upon it, and to the person who, Congress has said, should be taxed upon it. Section 22(a) is not weakened by this—indeed it is considerably more literally and accurately applied than petitioner would have it in the present case. Congress, then, instead of the Courts, will enact legislation if it believes it necessary. Congress then will define, with accuracy, the extent to which it believes that the income of term trusts should be taxed to the grantor in order to prevent the avoidance of surtaxes. But, we submit, until Congress does so speak, the income should be taxed, as Congress has directed, to the one who receives it, who enjoys it, and who can pay taxes out of it—the beneficiary.

POINT VI.

If Section 166 or Section 22(a) or any other provision of the 1934 Act had the effect of taxing income from this trust to respondent, its constitutionality would be doubtful.

Respondent further submits that were the Revenue Act of 1934 to be construed as desired by petitioner, its constitutionality would be seriously imperilled. Congress has no authority to tax to one person the income of another.

> *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206.

In this case it appeared that the Wisconsin income tax law provided that a husband should report as his own in-

come the independent income of his wife. This Court in holding the statute unconstitutional said (p. 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540."

There is no doubt that the Court would reach a similar conclusion with regard to a similar act of Congress. For example, the following language appears in *Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85 (relied on by petitioner, Br. in No. 383, p. 29), where this Court states, page 92:

> "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. In the same category falls a statute seeking to tax the separate income of a wife as income of her husband."

Indeed, in the *Hoeper* case itself, at page 215, immediately preceding the above quoted portion of its opinion the Court quoted from *Knowlton* v. *Moore*, 178 U. S. 41, 77, with respect to the powers of Congress as follows:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1940.

Appendix.

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (U. S. C., Title 26, Sec. 22.)

Sec. 166. Revocable Trusts.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

Art. 166-1 [as amended by T. D. 4629, XV-1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937-2 Cum.

Bull. 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to retake the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not,

or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

(*d*) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

New York Personal Property Law:

§11. Suspension of Ownership.

The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator; except that a contingent gift in remainder may be made on a prior gift in remainder, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the interest of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority. Lives in being or a minority in being shall include a child begotten before the creation of the estate but born thereafter. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property.

§16. Validity of Directions for Accumulation of Income.

An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority.

2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority.

3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority. * * *

(Certain provisions, dealing with accumulations in special types of trusts, such as trusts for charitable or educational institutions, employers' pension trusts and trusts for the payment of insurance premiums are omitted.)

§23. Revocation of Trusts Upon Consent of All Persons Interested.

Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

New York Real Property Law:

§39. Definition of Reversion.

A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of one or more particular estates granted or devised.

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SUPREME COURT OF THE UNITED STATES.

No. 384.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Meredith Wood.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 26, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, like *Helvering* v. *Clifford*, — U. S. —, is here on certiorari, the problems in the two cases being the same in certain essential respects. In April 1931 respondent, who owned twenty-five shares of stock of Book-of-the-Month Club, Inc., made himself trustee of those shares under an agreement which was to expire in three years[1] or earlier on the death of either him or his wife. By the trust he was to "hold, invest, and reinvest" the shares, to "collect the net income therefrom" and to pay it to his wife. He had the power to "retain" the stock or to "sell" it or "any part thereof" at such "time and on such terms" as he should "deem proper".[2] It was provided that his power of investment or reinvestment of "any of the property or moneys held in trust" was not to be restricted by any law governing investments by trustees. He was also given power to "fix and determine" the value of the property for all purposes of the trust and to determine "whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income," with the proviso, however, that stock dividends and subscription rights should be treated as principal. He was prohibited from receiving any commissions with respect to principal or income; and an exculpatory clause purported to protect him against any loss except that occasioned by his wilful misconduct. He had

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[1] In 1932 the term was extended to five years from April, 1931.

[2] His right to sell was subject to a collateral agreement, not material here, with one Scherman, granting Scherman a preemptive right in case respondent decided to sell.

the power to appoint a substitute trustee.[3] On termination of the trust "all property then held in trust" was to go to him. The trust contained no power of revocation nor any power to revest in the grantor at any time, prior to the date of termination, title to any part of the corpus.

During 1934 respondent paid over to his wife $8,750, which was the entire income from the trust for that year. She included it in her income tax return. The Commissioner, being of the opinion that the income was taxable to respondent, determined a deficiency in his 1934 return. Respondent appealed to the Board of Tax Appeals which held that petitioner was in error (37 B. T. A. 1065). The Circuit Court of Appeals affirmed (104 F. (2d) 1013) on the authority of *United States* v. *First National Bank of Birmingham*, 74 F. (2d) 360.

Petitioner maintains that the trust income is taxable to respondent either under § 166 or § 22(a) of the Revenue Act of 1934 (48 Stat. 680) or both.

By § 166 the income from a trust is taxable to the grantor where "at any time the power to revest in the grantor title to any part of the corpus of the trust is vested" in him or in any person "not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom."[4] Petitioner has not undertaken to establish that under New York law, which governs this trust, respondent had the power to revoke it prior to the end of the term. But in his contention that the trust here involved is covered by § 166, petitioner points out that there is no practical difference between a revocable trust and one certain to be terminated soon. And he argues that it would not be sensible to impute to Congress a purpose to impose the tax when the grantor has an executory power to revest title in himself but to withhold the tax when the

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[3] No substitute trustee was, however, appointed, respondent continuing to act as trustee until termination of the trust in 1936.

[4] Sec. 166 reads in full:

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

"(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

grantor, by provisions in the trust deed, has already exercised that power.

Our difficulty lies not in an inability to see the similarity of those situations but in being able to say that Congress treated them the same under § 166. A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the ~~donee~~ donor; a reversion is the residue left in the grantor on determination of a particular estate. See Tiffany, Real Property (2nd ed.) § 129 *et seq.*, § 316 *et seq.* Congress seems to have drawn § 166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here. Whether wisely or not, Congress confined § 166 to trusts where there was a "power to revest". The problem of interpretation under § 166 is therefore quite different from that under § 22(a). The former is narrowly confined to a special class; the latter by broad, sweeping language is all inclusive. *Helvering* v. *Clifford; supra.* Accordingly, the wide range for definition and specification under the latter is lacking under § 166. And so far as § 166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed. The legislative history corroborates this conclusion. When the 1934 Act was before the House Committee, the Treasury recommended that income from short term trusts and from revocable trusts should be taxable to the creator.[5] The Congress adopted the latter[6] by an

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[5] Revenue Revision, 1934, Hearings before the Committee on Ways & Means, H. R. 73rd Cong., 2nd Sess., p. 151. The recommendation read: "The income from short term trusts and trusts which are revocable by the creator at the expiration of a short period, after notice by him should be made taxable to the creator of the trust."

[6] Conference Rep. No. 1385, H. R. 73rd Cong., 2nd Sess., p. 24:

"Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year.

appropriate amendment to § 166; but it did not select the former for special treatment. When such clear choice of ideas has been made in the drafting of a specific provision of the law, its language must be taken at its face value. Sec. 166 is therefore not applicable to this trust since respondent is given no power to recall the corpus. He or his estate gets it at the end of the term, on the death of his his wife, or on his own death—whichever is the earliest.

For a wholly different reason, petitioner's argument based on § 22(a) must fail. The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22(a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than § 166. Though petitioner in his petition for certiorari relied on § 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. As we have indicated, the issues under § 166 and § 22(a) are not coterminous. Though both deal with concepts of ownership, the range of inquiry under the latter is broad, under the former confined. To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation.[7] See *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418. It is not apparent why a less strict rule is necessary in order adequately to protect the revenue.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate amendments require the income from trusts of this type to be reported by the grantor. The House recedes.''

[7] Art. 166-1 of Treasury Regulations 86, originally promulgated under § 166, was not promulgated under § 22(a) until 1936 (T. D. 4629), two years after the tax liability here in issue occurred. Hence we do not have a case of reliance by the government on a regulation which during the taxable year in question rested on two legs, one of which was § 22(a).